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IN THE

Supreme Court of the United States

CLIFFORD ACREE, *et al.*,
Petitioners,

v.

REPUBLIC OF IRAQ, *et al.*,

and

UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF FOR ST. MARY'S UNIVERSITY SCHOOL OF LAW CENTER FOR TERRORISM LAW, THE NATIONAL LEAGUE OF POW/MIA FAMILIES, THE NATIONAL COMMANDER & NATIONAL ADJUTANT OF AMERICAN EX-PRISONERS OF WAR, AND DISTINGUISHED AMERICAN FORMER NATIONAL SECURITY OFFICIALS IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* IN SUPPORT OF PETITIONER

Petitioners Colonel Cifford Acree, *et al.*, and Respondent the United States of America have each consented to the filing of this brief by *amici curiae*, St. Mary's University School of Law Center for Terrorism Law ("CTL"); National League of POW/MIA Families; and a Group of Distinguished Former High-Level American National Security Officials. Because the Republic of Iraq, *et al.*, have not consented, CTL, *et al.*, hereby move, pursuant to Supreme Court Rule 37.2(b), for leave to file an *amici curiae* brief in support of Petitioners.

CTL is a non-partisan, non-profit, fully operational legal research center dedicated to the study of issues associated

with both antiterrorism and counterterrorism. CTL's mission is to examine current and potential legal issues related to terrorism in light of the challenge of achieving and maintaining a proper balance between global security and civil justice. The director of CTL is professor Jeffrey F. Addicott, a former Army Judge Advocate, who served in senior legal positions throughout the world, and now specializes in national security law and human rights law.

CTL pursues this goal through professional exchanges such as symposia and consultation; writing, commenting on, and publishing written materials; and ensuring access to extensive information resources regarding terrorism. The national security interests at stake in this case are of great importance. CTL has an interest in the effect this case will have on protecting United States military personnel held as prisoners of war ("POWs") from brutal torture, and its impact on eroding a longstanding and important security policy of the United States in support of effective war fighting—that is, this nation's commitment against the torture of POWs, the practice of torture generally, and the enforcement of the laws of war.

The National League of Families of American Prisoners and Missing in Southeast Asia's sole purpose is to obtain the release of all prisoners, the fullest possible accounting for the missing; and repatriation of all recoverable remains of those who died serving our nation during the Vietnam War.

The Group of Distinguished Former High-Level American National Security Officials are former public servants who have served their Nation in the national security process of the United States. The group believes that America has a great opportunity to send a powerful message that the torture of American POWs will not be tolerated.

CTL has its own vital and practical interest in the legal issues raised by this case, particularly the ramifications for

future POWs subjected to horrific torture by enemy regimes. CTL is dedicated to the principle that violators of the law of war should be brought to justice and that those brave men and women of the United States Armed Forces should be ensured recourse for such violations.

CTL's background and experience in exploring, analyzing, and researching those legal issues at stake are highly germane to this case. CTL submits this brief to illustrate the impact of the Court of Appeals decision below on the United States' commitment to protect POWs from inhuman treatment, and of the United States' national security interest of protecting its military men and women. Certiorari review is needed to correct the Court of Appeals for the District of Columbia's erroneous interpretation of the Foreign Sovereign Immunities Act ("FSIA"), the Flatow Amendment, and § 1606 of FSIA. Moreover, certiorari review is needed to remedy the court of appeals impropriety of vacating the Petitioners' judgment *sua sponte*. Given the ramifications of this case on future POWs and its consequences on national security, CTL respectfully requests leave to file the attached brief *amici curiae* in support of Petitioners.

Respectfully submitted,

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BRIEF OF THE CENTER FOR TERRORISM LAW AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

This *amici curiae* brief is submitted on behalf of St. Mary's University School of Law, Center for Terrorism Law ("CTL"); National League of POW/MIA Families; the National Commander and the National Adjutant of American Ex-Prisoners of War; and a group of former American distinguished high-level national security officials identified at App. A. Petitioners Colonel Clifford Acree, *et al.* and Respondent the United States of America have consented to CTL's filing of this brief. The correspondence regarding CTL's requests for consent have been filed in the office of the Clerk.

The petition presents two questions for review: (1) Does a United States citizen who has been tortured by a state sponsor of terrorism have a cause of action against the foreign sovereign under either state or federal law?; and (2) Does a United States citizen who has been tortured by a state sponsor of terror have a cause of action for violation of universally accepted international legal norms against torture?

INTEREST OF *AMICI CURIAE* [1]

The director of the CTL is professor Jeffrey Addicott, a former Army Judge Advocate, who served in senior legal positions throughout the world, and now specializes in national security law and human rights law. CTL's mission is to examine current and potential legal issues related to terrorism in light of the challenge of achieving and maintaining a proper balance between global security and civil justice.

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[1] Pursuant to Rule 37.6, amici certifies that no counsel for a party authored this brief in whole or in part, and that no person or entity, other than the amici, its members, or counsel, has made a monetary contribution to this brief's preparation or submission. This brief is filed with the consent of the parties, and letters indicating such consent have been filed with the Court.

CTL and all other *amici* have an interest in the effect this case will have on protecting United States military personnel held as POWs from brutal torture, and its impact on eroding a longstanding and important security policy of the United States in support of effective war fighting—this nation's commitment against the torture of POWs, the practice of torture generally; and the enforcement of the laws of war.

The decision by the D.C. Circuit in *Acree v. Republic of Iraq* dramatically undermines these national security interests. It is inconsistent with the United States' historic commitment of more than 140 years to the laws of war which protects POWs from torture and inhuman treatment. Furthermore, this decision, and the intervention of the United States in the underlying litigation prompting the *Acree* appeal which the D.C. Circuit used as a vehicle to *sua sponte* vacate the judgment, are antithetical to United States' national security interests and fatally undermine the future safety of United States military men and women who may someday become POWs. CTL submits this brief to amplify the adverse impact of the D.C. Circuit's decision on national security, and to argue that certiorari review is needed to correct the D.C. Circuit Court's erroneous interpretation of the Foreign Sovereign Immunities Act ("FSIA"), the Flatow Amendment and § 1606 of FSIA, and to resolve the far-reaching uncertainty occasioned by that decision.

SUMMARY OF ARGUMENT

During the 1991 Gulf War, Iraq savagely tortured American POWs inflicting beating; starvation; electric shock; whipping; mock executions; threatened castration and dismemberments; horrifying genital inspections; broken bones and eardrums; deprivation of medical care; and confinement in vile, disease-ridden filth. These actions were condemned by Congress in three resolutions. In April 2002, the POWs filed suit against the Republic of Iraq under a 1996 Congressional amendment to the FSIA seeking to raise public

awareness; hold Saddam Hussein and his regime accountable; deter the torture of American servicemen and women; and obtain compensation for their injuries. On July 7, 2003, a federal judge ruled in favor of the POWs, writing of Iraq's "unrestrained savagery" against our "handcuffed and blindfolded POWs," and concluding: "POWs are uniquely disadvantaged and deterring torture of POWs should be of the highest priority."

For nearly a century and a half, the United States has been committed to effectuating the laws of war which protect POWs from torture and inhuman treatment. Review by this Honorable Court of the legal issues at stake in this litigation is vital to United States' national security interests and protection of the men and women of the United States armed forces. In addition, such review may be imperative in reassuring not only the domestic population, but also the global community, that the United States remains committed to and adheres to the laws of war. Failing to protect those men and women who defend the United States with their lives from brutal torture and horrendous war crimes is tantamount to telling the world that the laws of war are no longer applicable, essentially opening the door for scores of similar incidents. Because of the far reaching impact the issues present, review by the United States' highest court is direly needed.

The D.C. Circuit Court's decision runs roughshod over decades of United States dedication to the laws of war, and sends a message to United States military personnel that while they protect their country, their country will not protect them. Both the United States of America and the Republic of Iraq have ratified the Third Geneva Convention Relative to the Treatment of Prisoners of War, making it impermissible for any High Contracting Party to absolve itself or any other High Contracting Party for "grave breaches" under Article 130, including the torture or inhuman treatment of POWs. Moreover, the United States has ratified the universal pro-

scription against torture in international human rights law which also finds reflection in its municipal law.

The decision rendered by the D.C. Circuit is nothing less than a rebuff of universally-established principles which outlaw the torture of POWs and make liable those parties engaging in such activity. By denying POW victims of torture legal recourse, the D.C. Circuit's decision endangers national security and creates a more dangerous world for the armed forces of the United States: one where those who implement torture for their own purposes are not accountable for such actions. As such, the Court should overturn the erroneous decision in *Acree v. Republic of Iraq* in which the court of appeals relied on the post-judgment holding in *Cicippio-Puleo v. Islamic Republic of Iran* concerning available causes of action under the terrorism exception to the Foreign Sovereign Immunities Act to *sua sponte* set aside Petitioners' judgment. In the alternative, the Court should grant, vacate and remand the case for reconsideration in light of the proper application of the law and the Court's decision last term in *Sosa v. Alvarez-Machain.* By taking these actions, this Court will be reaffirming the rule of law and the United States' commitment to eradicating torture at a time when such commitment is absolutely vital.

The Government contends that seeking to intervene in the litigation below was vital to national security, arguing that the Iraqi funds which the POWs sought to execute their judgment against as permitted by law were earmarked for the reconstruction of Iraq. However, this was a guise as the POWs were effectively precluded from accessing the frozen Iraqi assets, as well as assets otherwise committed to the war effort.[2] In addition, the POWs have made multiple offers to the United States to negotiate a good faith solution to any

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[2] For example, all petroleum products of Iraq are protected by Executive Order. Exec. Order No. 13,303, 68 Fed. Reg. 31,931 (May 22, 2003).

payment, and its timing, from Iraqi assets. Moreover, the payments for infrastructure damage to Kuwait stemming from the 1990 invasion were continuing during the war from the proceeds of Iraqi oil. Indeed, the Government's contention that the case should stand as vacated begs the question: why are the treaty right interests of brutally tortured American POWs less a priority than the war debts owed by Iraq to Saudi Arabia, Kuwait and Russia?

Not only does basic fairness require an opportunity for reconsideration in light of the proper application of the law and the Court's decision last term in *Sosa v. Alvarez-Machain,* but upholding the decision of the D.C. Circuit would effectively exonerate the Republic of Iraq for its torture of POWs. This is inconsistent with the American historical commitment to the laws of war protecting POWs from torture, particularly the United States adherence to Article 130 of the Geneva Convention Relative to the Treatment of Prisoners of War, and goes against United States' na tional security interests. Moreover, the universal proscription against torture in international human rights law is ratified by the United States and reflected in its municipal law. *Amici* believe that one way for the Court to dispose of this damaging and erroneous Court of Appeals decision is to grant, vacate, and remand the case.[3]

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[3] *Amici* note that Petitioners presented five separate bases for cause of action to the District Court in their Legal Brief to the District Court. See Pet. Appendix in Petitioners' filing. Yet the Court of Appeals did not acknowledge this information in the record or credit Petitioners with stressing at oral argument before the Court of Appeals the unquestioned state law bases for cause of action under the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1602-1611.

ARGUMENT

I. BASIC FAIRNESS REQUIRES AN OPPORTUNITY FOR CONSIDERATION OF ALL OTHER BASES FOR CAUSE OF ACTION BEFORE VACATING THE JUDGMENT FOR FAILURE TO STATE A CAUSE OF ACTION

This case is of great importance for the protection of American POWs from torture. Accordingly, this Court should take special care to ensure maintenance of appropriate judicial procedure. Not only has the court of appeals deprived tortured American POWs of their day in court, the court *sua sponte* set aside a valid judgment against their torturers. The Court should overturn *Acree* or remand the case for reconsideration in light of the proper application of the law and the Court's decision last term in *Sosa v. Alvarez-Machain*. Indeed, when a post-judgment decision sets aside grounds for cause of action previously believed by the judiciary to be applicable, basic fairness requires an opportunity for consideration of all other bases for cause of action before vacating the judgment on the grounds that there was no cause of action. This is particularly so when this non-jurisdictional issue is raised by the court of appeals *sua sponte* and for the first time on appeal following waiver of the issue on default by defendants, without briefing of the issue by the parties, and where both the plaintiffs and the district court relied on valid additional causes of action not considered by the court of appeals.

II. THE DECISION OF THE D.C. CIRCUIT EFFECTIVELY EXONERATES THE REPUBLIC OF IRAQ FOR THE TORTURE OF THE PETITIONERS, IS INCONSISTENT WITH THE UNITED STATES' MORE THAN 140-YEAR COMMITMENT TO THE LAWS OF WAR PROTECTING POWS FROM TORTURE AND INHUMAN TREATMENT, AND IS ANTI-THETICAL TO THE UNITED STATES' NATIONAL SECURITY INTERESTS

A. Keeping The Faith Of Our Service Personnel By Doing Everything In Our Power To Prevent The Torture Of POWs Is Of Great Importance To The National Security Of The United States.

History has shown that one of the most vital components of any democratic society is its military establishment. Nowhere is this truer than in time of war when the men and women of the armed forces are called on to kill or be killed. Since the Viet Nam conflict, the soldiers who make up the armed forces of the United States have been volunteers. These volunteers continue today to fight and die for their nation in a variety of military campaigns. While these volunteers certainly understand the dangers inherent in the profession they have chosen, they also rightly expect that the nation will do all that is necessary to protect them from unnecessary suffering. *See, e.g.*, President George Bush, Address to the Nation Announcing Allied Military Action in the Persian Gulf (Jan. 16, 1991) ("Prior to ordering our forces into battle, I instructed our military commanders to take every necessary step to prevail as quickly as possible, and with the greatest degree of protection possible for American and allied service men and women. Our troops will have the best possible support in the entire world, and they will not be asked to fight with one hand tied behind their back.") One of the most horrifying dangers associated with combat is the

specter of being captured and tortured by enemy forces. Even more troubling is the realization by American soldiers that in many of the wars that the United States has fought, the enemy has openly and flagrantly violated numerous provisions of the laws of war to include committing command-directed torture of POWs. As was the case in the Viet Nam conflict, the Gulf War of 1991 saw Iraqi command-directed torture as the systemic rule for American POWs, not the exception.

To assuage the fears our service men and women have of command-directed enemy torture, the United States must deter those nations who would engage in such brutal acts. With the men and women of the United States armed forces assuring the nation's security with their very lives, mitigating any suffering they may experience as a result of captivity is vital to furthering the faith these individuals have in the military establishment and their country.

The use of civil litigation is one critical means of curbing these human rights abuses. Thus, it is particularly inappropriate to vacate Petitioners' judgment and deny tortured American POWs an adequate opportunity to reaffirm for the court the appropriate bases for cause of action, particularly when the D.C. Circuit Court continues to permit other cases to proceed to further argument on the issue of cause of action. *See Price v. Socialist People's Libyan Arab Jamahiriya*, No. 03-7095, 2004 WL 2656891, at *5 (D.C. Cir. Nov. 23, 2004); *Kilburn v. Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123, 1131-33 (D.C. Cir. 2004); *Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024 (D.C. Cir. 2004). In the *Acree* case, however, the court of appeals has set aside the law specifically believing that it is aiding the national security interests of the United States when the reality is just the opposite. In short, the court of appeals has, in contravention of the law, unfairly disfavored American POWs who voluntarily put their life on the line for their country. Moreover, the court of appeals has done this *sua sponte*. The

actions of the court of appeals send a terrible signal to tyrants that the United States does not take seriously the torture of American POWs, leaving tyrants free and undismayed from torturing our service men and women.

As set out in App. B, a letter addressed to President George W. Bush from twenty former high-level national security officials makes clear that by granting relief to these American POWs "we have a unique opportunity to establish a historic precedent that nations that torture American POWs will be held accountable." Effective war fighting by the United States requires adherence to the laws of war and failure to do so undermines the effectiveness of our actions which can cost the nation dearly in the political dimension of winning the war on global terrorism. Presented to this Court is an opportunity to rectify the mistakes made by the D.C. Circuit Court and aid in this effort. If this case stands, it would encourage brutal torture of American POWs in future wars. To the contrary, the effort of all civilized peoples has consistently been to prevent the torture of POWs. Following this rule of law is a critical component of the national security interests of the United States both in effective war fighting and in supporting our own service personnel.

B. The Prohibition Against Torture And Inhuman Treatment For POWs Is A Fundamental Principle Of Humanitarian Law And The Decision Of The D.C. Circuit If Left To Stand Would Show That The United States Does Not Take Torture Seriously, And Is Abandoning Its Historic Commitment To The Laws Of War.

International concern for and commitment to the welfare and humane treatment of soldiers in war first appeared in the Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, signed at Geneva in 1864. 129 Consol. T.S. 361 (1969). A considerable majority of

nation states, including the United States, ratified this treaty. *Id.* This important Geneva Convention represents the first effort by the then-majority of nation states to develop international humanitarian law, or *jus in bello*. Frits Kalshoven, *Constraints on the Waging of War* 8-11 (1987).

Of great significance to this litigation is the historical commitment by the United States to protect POWs. In 1863, during the American Civil War, the United States issued General Orders No. 100, entitled, "*Instructions for the Government of Armies of the United States in the Field.*" Known as the Lieber Code, after its author, the order articulated stringent standards for the protection of POWs. Specifically, Article 56 states: "A prisoner of war is subject to no punishment for being a public enemy, nor is any revenge wreaked upon him by the intentional infliction of any suffering, or disgrace, by cruel imprisonment, want of food, by mutilation, death, or any other barbarity." Richard Shelly Hartigan, *Lieber's Code and the Law of War* 56 (1983).

Inspired by the Geneva Convention of 1864, the Lieber Code of 1863, the 1868 Declaration of St. Petersburg (138 Consol. T.S. 297 (1976)), and the Declaration of Brussels in 1874 (148 Consol. T.S. 133 (1977)), the international community convened in 1899 for the First Hague Peace Conference. Kalshoven at 13-14. This Conference produced the Convention with Respect to the Laws and Customs of War on Land, with annexed Regulations 187 Consol. T.S. 429 (1979). The Convention emphasized that POWs "must be humanely treated." *Id.* at 436. The Second Hague Peace Conference of 1907 produced the Convention for the Adaptation to Naval War of the Principles of the Geneva Convention, which reaffirmed its predecessors thereby preserving the humane treatment standard for POWs. These two Conventions were ratified by the vast majority of nation states, including the United States. *Convention Concerning the Laws and Customs of War on Land*, 205 Consol. T.S. 277

(1980); *Convention for the Adaptation of the Principles of the Geneva Convention to Maritime War*, 205 Consol. T.S. 359 (1980). Moreover, the 1929 Geneva Convention Relative to the Treatment of Prisoners of War once again reiterated the rules of humanitarian law protecting POWs by mandating that they "must at all times be humanely treated and protected, particularly against acts of violence, insults, and public curiosity." *Geneva Convention Relative to the Treatment of Prisoners of War*, 118 L.N.T.S. 343, 357 (1931). By the commencement of World War II, commentators consistently acknowledged that the principles, laws, and regulations set forth in the Hague Conventions, including those protecting POWs from murder and ill-treatment were extensively recognized by the community of nations as the customary international law of war. Kalshoven, at 15-16.

At the conclusion of World War II, victorious allied forces including the United States convened two international military tribunals. The first operated under the Nuremberg Charter of the International Military Tribunal. *See* 82 U.N.T.S. 279 (1945). This famous Charter defined war crimes to include "murder or ill-treatment of POWs or persons on the seas." *Id.* at Art. 6. The Nuremberg Charter was augmented by the Allied Control Council Law No. 10: Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity which likewise forbade "murder or ill-treatment of POWs or persons on the seas." Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Crimes Against Humanity, Dec. 20, 1945, *reprinted in Official Gazette of the Control Council for Germany* 50-55 (1946).

The second tribunal was established by the Charter of the International Military Tribunal for the Far East which also established subject matter jurisdiction for "conventional war crimes: namely, violations of the laws or customs of war." *Charter of the International Military Tribunal for the Far*

East, 4 Bevans 20 (1946). Conventional War Crimes refers to those articulated in the Hague Convention of 1899 and its successors which prohibited, like the Nuremberg Charter, the murder and ill-treatment of POWs.

Following the conclusion of the proceedings at Nuremberg in 1950, the United Nations International Law Commission drafted the *Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal*. Report of the International Law Commission, U.N. GAOR, 5 Sess., Supp. 12, at 11-14, UN Doc. A/1316 (1950), *reprinted in* [1957] 2 Y.B. Int'l L. Comm'n 364 (1957). These principles reinforced the prohibition against war crimes, once again, specifically prohibiting the murder or ill-treatment of POWs. *Id.* The United States ratified the Charters of both Tribunals and therefore, once again, demonstrated its steadfast adherence to the principles that protect POWs from murder and ill-treatment. Of further significance, is the fact that the murder and ill-treatment of POWs were criminalized under the 1949 Charters and hence under the international rule of law.

At present, the global regime for humanitarian law consists of four conventions plus two protocols. One of these Conventions is the Geneva Convention Relative to the Treatment of Prisoners of War. 75 U.N.T.S. 135. This Convention, like its three companion treaties which protect civilians and those *hors de combat* (incapacitated by wounds) in the field and at sea, is ratified by virtually all nation states, including the Republic of Iraq and the United States. *See* Burns H. Weston, *International Law & World Order: Basic Documents* app. 1 at 52-53 (3rd ed. 2000).

Numerous provisions in the 1949 Convention merit specific review. The first is Article 13 which requires that POWs receive humane treatment at all times. 75 U.N.T.S. 135, 146. Prohibitions include unlawful acts causing death or seriously endangering the health of POWs as well as "acts of violence

or intimidation." *Id.* Article 17 mandates that no POWs may be subjected to "physical or mental torture, nor any other form of coercion" for purposes of securing "information of any kind." *Id.* at 150. Article 23 forbids the deployment of POWs to a combat zone where they may be exposed to fire from their own armed forces. *Id.* at 154-55. Article 130 defines "grave breaches" to this Convention to include "willful killing, torture or inhuman treatment" of POWs. *Id.* at 238. Iraq violated every one of these prohibitions in its maltreatment of Petitioners.

It is important to note that America's continuing commitment to the protection of POWs does not end with its ratification of the Third Geneva Convention of 1949. As a result of the internecine civil war in Yugoslavia during the early 1990's, the United States as a permanent member of the U.N. Security Council voted in favor of the Council's establishment of the *ad hoc* International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia. *Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991*, adopted by the United Nations Security Council, May 25, 1993. SC Res. 827, UN SCOR, 48 Sess., 3217th mtg., UN Doc. S/RES/827, amended by SC Res 1166, UN SCOR, 53 Sess., 387th mtg., UN Doc. S/RES/1166. The Tribunal's statute criminalized "grave breaches of the Geneva Conventions of 1949." These grave breaches include "willful killing; torture or inhuman treatment," and intentional infliction of "great suffering or serious injury to body or health." *Id.* at Art. 2. The prohibition of these grave breaches was designed to protect all categories of non-combatants under the Geneva Conventions of 1949 including POWs, civilians or those *hors de combat*. *Id.* Article 7 of the statute establishes "individual criminal liability" which includes all those in the chain of

command from the head of state or government to the lowest subordinate. *Id.* at Art. 7. This imposition of individual criminal liability was derived from the Charters of the International Military Tribunals for Nuremberg and Tokyo in 1945 and 1946, respectively. 82 U.N.T.S. 279 (1945); 4 Bevans 20 (1946). In accordance with its prior commitments to international law, the United States remained faithful to the rule of law and the prohibition of war crimes to include willful killing, torture and inhuman treatment of persons such as POWs.

III. IT IS OF GREAT IMPORTANCE TO THE NATIONAL SECURITY INTERESTS OF THE UNITED STATES TO ADHERE TO OUR TREATY OBLIGATIONS, IN PARTICULAR ARTICLE 131 OF THE GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR.

The 1929 Geneva Convention Relative to the Treatment of Prisoners of War reinforces the well-established rule of humanitarian law protecting POWs by mandating that they "must at all times be humanely treated and protected, particularly against acts of violence, insults, and public curiosity." *Geneva Convention Relative to the Treatment of Prisoners of War*, 118 L.N.T.S. 343, 357 (1931). The United States ratified this Convention, once again demonstrating consistent adherence to this important rule of law. Of note, is the fact that the ratification of this Treaty by the German Reich, and not by Russia, was a causative factor in the disparate treatment of Allied versus Russian POWs by the Third Reich in World War II. Hilaire McCoubrey, *International Humanitarian Law: Modern Developments in the Limitation of Warfare* 128 (2d ed. 1998). This situation clearly demonstrates the essential need for states to ratify and to comply with the rule of law which protects POWs.

Both the United States and the Republic of Iraq have ratified the Geneva Convention Relative to the Treatment of Prisoners of War and are therefore bound to observe its mandates. These two are included among the 192 states that have become party to this particular treaty. This provision for non-absolvable state liability is a core enforcement mechanism in the Convention. In particular, Article 131 mandates that states parties, thus including the United States, may not "absolve" a torturing state of "any liability" for grave breaches of the Convention, which includes the torture of POWs. In addition, during World War II even under the stresses of fighting the German Army, one of the most formidable military machines in history, the United States did not resort to command directed torture. This is despite the fact that the lives at stake in the movement of entire divisions was certainly as great as anything we face from terrorists today.

The United States' intervention in this litigation in essence repudiates Article 131 of this Convention's immutable rule of law protecting POWs. Such repudiation undermines national security in that it sends the unmistakable message that the United States does not value this Geneva Convention, and therefore may be assumed not to value the other Geneva Conventions which protect civilians and those incapacitated by combat wounds. The position taken by the United States in this matter imperils courageous and patriotic American military men and women who may become POWs because it informs the community of nations that rogue states will not be held accountable for state-sponsored torture of POWs.

Article 131 of this Convention states: "No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of "grave breaches" as defined in Article 130. *Id.* The 1949 Geneva Convention Relative to the Treatment of Prisoners of War thus affords

POWs the most comprehensive cluster of rights and protections to date and imposes liability on ratifying nation states, such as the United States of America and the Republic of Iraq, for its breach to include unlawful absolution under Article 131. This Treaty's universal ratification represents a consensus rarely achieved in conventional international law on a issue of such significance, and therefore its mandates must be observed. This, too, would be violated by the United States' absolution of Iraq in the *Acree* case. The Conventions and their Protocols call for measures to be taken to prevent (or put an end to) what are known as "grave breaches;" those responsible for breaches must be punished. Without punishment, in this instance through the use of civil litigation—a means of justice afforded by Congress to the victims of torture—the consensus against inhuman treatment to POWs is rendered nugatory.[4]

Since the key purpose behind Article 131 of the POW convention is deterrence against torture—Article 131 is one of the key enforcement mechanisms built into the POW Convention to ensure state liability for torture—this liability cannot be waived as an end of war settlement by either party. Thus, the United States is required to observe its mandates, thereby showing its commitment to the laws of war. Any deviation in this practice may open the door for others to rebuke the international norms under which wars are fought, thereby endangering our military personnel as well as our national security.

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[4] Article 131 is "self executing" under the classic Supreme Court standard of Chief Justice Marshall in *Foster v. Neilson*, 27 U.S. 253, 254 (1829), which states: "Our constitution declares a treaty to be the law of the land. It is, consequently regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision." Since the obligation in Article 131 never to "absolve" a torturing State of "any liability" is a negative prohibition, rather than an engagement to perform a particular act, it clearly operates "of itself."

IV. THE UNIVERSAL PROSCRIPTION AGAINST TORTURE IN INTERNATIONAL HUMAN RIGHTS LAW IS RATIFIED BY THE UNITED STATES AND REFLECTED IN ITS MUNICIPAL LAW

As illustrated above, it has long been a United States national security policy to work for human rights and against practices such as torture. Not only has this been the policy of the United States, but the United States has also led the world in this regard, and has made it a critical element of our foreign and national security policies. Accordingly, the prevention of torture of POWs as evidenced by international humanitarian law and reflected by the United States' adherence to such laws, has been core to our national security interests and remains so.

The International Bill of Human Rights constitutes the core of international human rights law and consists, *inter alia*, of the Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3rd Sess., Pt. I, Resolutions, at 71, U.N. Doc. A /810 (1948), and the International Covenant for Civil and Political Rights, G.A. Res. 2200, U.N. GAOR, 21st Sess., at 49 (1966). The Universal Declaration at Art. 5 prohibits subjecting anyone to "torture or to cruel, inhuman, or degrading treatment or punishment." The International Covenant repeats the language of the Universal Declaration regarding torture. *Id.* at 50. Also, as to the relative importance of torture vis-à-vis other human rights, the International Covenant contains a derogation clause which operates during a "public emergency, which threatens the life of the nation" and is so proclaimed by the government. *Id.* This derogation clause allows for an abridgment of all but a few of the many rights contained in the Covenant. *Id.* Torture is excluded from derogation because of its fundamentally abhorrent nature. *Id.* The Declaration has customary international law status while the International Covenant is conventional and

was created to codify the rule of law prohibiting torture as set forth in the Declaration. Both documents are ratified by the Republic of Iraq and by the United States. Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3rd Sess., Pt. I, Resolutions, at 71, U.N. Doc. A /810 (1948), and the International Covenant for Civil and Political Rights, G.A. Res. 2200, U.N. GAOR, 21st Sess., at 49 (1966). They derive inspiration from Article 1 of the U.N. Charter which promotes and encourages "respect for human rights and fundamental freedoms for all" with implementation mandated for all members in Art. 56. U.N. Charter Art. 1, para. 3. The U.N. Charter was ratified by both the Republic of Iraq and by the United States, reflecting a fundamental commitment to the rule of law and the prohibition of torture.

The International Bill of Human Rights was a catalyst for the creation of dozens of other treaties in the global and regional international community for the protection of the natural person. *See generally* Weston, *International Law & World Order: Basic Documents.* Of particular note is the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment. 1465 U.N.T.S. 85. This Convention incorporates by reference the torture Articles 5 and 7 of the Universal Declaration of Human Rights and the International Covenant of Civil and Political Rights, respectively. *Id.* at 113. Significantly, this Convention provides a substantial definition of torture in Art. 1. Therein, "torture" refers to the intentional infliction of "severe pain or suffering, whether physical or mental," on persons to extract "information or a confession," or to punish persons for acts they have committed or are suspected of committing. *Id.* at 113-14. Torture must be inflicted "with the consent or acquiescence of a public official or other person acting in an official capacity." *Id.* at 114. Like the International Covenant on Civil and Political Rights, the Convention Against Torture contains a derogation clause which states that there are "no exceptional circumstances whatsoever," including

"war, internal political instability or any other public emergency" which justify torture as a lawful instrument of governance. *Id.* Notably, the United States ratified this treaty in 1994. *See* Weston, at 1304.

In accordance with Art. 2 of the Convention Against Torture, each ratifying state must give legal effect to the Convention's provisions through legislative, administrative and judicial action. 1465 U.N.T.S. 85, 114. Hence, legislation was enacted to bring United States' law into conformity. *See e.g.*, 18 U.S.C. §§ 2340, 2340B (1994). Further evidence of United States' commitment to the prohibition of torture is found in the Torture Victim Protection Act of 1991, which forbids custodial torture by officials of foreign nations. 28 U.S.C. § 1350 (1993).

Furthermore, the international human rights regime in the Western hemisphere, found principally in the American Convention on Human Rights, forbids all "torture, cruel, inhuman, or degrading punishment or treatment." 1144 U.N.T.S. 123, 146. Having signed but not ratified this Convention, the United States is obligated to uphold its object and purpose, which logic dictates would include the fundamental prohibition against torture. *See* Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 336.

The record makes abundantly clear that Petitioners were tortured as POWs while in the custody of the Republic of Iraq. *See Acree v. Republic of Iraq*, 271 F. Supp. 2d 179 (D.D.C. 2003). The rule of law prohibiting their torture is likewise abundantly clear and unambiguous. The United States' practice of foreign relations law has consistently recognized the protection of the individual against the egregious abuses of the state. The United States' intervention in this litigation to have the POWs' judgment set aside, and the D.C. Circuit's decision doing so, are inconsistent with its historic adherence to the rule of law which protects the natural person. If this case stands, it

will undermine the consistent efforts of the United States of America to end torture.

CONCLUSION

Unless the Petitioners are granted an audience before the Court, the confused United States position on this matter imperils courageous and patriotic American military men and women who may become POWs because it informs the community of nations that violators will not be held accountable for state-sponsored torture of POWs. At the least, basic fairness requires reconsideration in light of the proper application of the law and the Court's decision last term in *Sosa v. Alvarez-Machain*. The United States government's intervention in this litigation exonerates the Republic of Iraq for the torture of POWs. This is not only a deviation from the American historical commitment to the laws of war, but also contrary to national security interests. It is absolutely imperative that America protect its POWs while at the same time advancing a policy that is designed to prevent future American soldiers from enduring the horrors of torture.

As argued by the Petitioners, and supported by the foregoing additional reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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March 21, 2005

APPENDICES

APPENDIX A

DISTINGUISHED AMERICANS APPENDING THEIR NAMES TO THIS BRIEF OF *AMICI CURIAE*

Ms. Clydie J. Morgan
National Adjutant, American Ex-Prisoners of War

James R. Cooper
National Commander, American Ex-Prisoners of War

Vice Admiral (Ret.) Robert Dunn,
United States Navy,

and

President, Naval Historical Foundation

Major General (Ret.) Alfred F. Valenzuela,
United States Army, Formerly Commander,
United States Army South, Deputy Commanding
General, United States Southern Command; and
Deputy Joint Task Force Panama Commander

Ambassador Max. M. Kampelman,
Chairman Emeritus of the American Academy of Diplomacy,
Georgetown University Institute for the
Study of Diplomacy and Freedom House

The Honorable Anthony Lake,
Former Assistant to the President for
National Security Affairs

The Honorable John Lehman,
Member of the '9/11' Commission, and
former Secretary of the Navy

Ambassador Mark Palmer,
Former Deputy Assistant Secretary of State, and
Ambassador to Hungary

Ambassador W. Nathaniel Howell,
Former U.S. Ambassador to the State of Kuwait

Vice Admiral (Ret.) James H. Doyle, Jr.,
United States Navy,
Former Commander, U.S. Third Fleet, and
Advisory Board, International Law, Naval War College

Major General (Ret.) John K. Singlaub,
United States Army,
Former Chief of Staff, U.S. Forces, Korea

Lieutenant General (Ret.) CJ Le Van,
United States Army,
Former J3, Operations Branch,
Joint Chiefs of Staff

Rear Admiral (Ret.) Horace B. Robertson, Jr.,
United States Navy,
Professor (Emeritus) Duke University School of Law, and
Former Judge Advocate General of the Navy

Malvina Halberstam,
Professor of Law, Cardozo School of Law, and
former Counselor on International Law to the
Department of State

John Jay Douglass
Professor of Law, University of Houston School of Law,
and Committee Member of the
ABA Standing Committee on Armed Forces Law

APPENDIX B

The Honorable George W. Bush
President of the United States
The White House
Washington, D.C.

Dear Mr. President:

We write to you as former public servants who have served their Nation in the national security process of this great country. We believe you have a unique opportunity for America to send a powerful message that the torture of American POWs will not be tolerated.

American POWs have been brutally tortured in war after war. While our government has tried to deal with this horror, there have been few options realistically available to us to add deterrence against it. Indeed, some of us have wrestled with precisely this challenge while in office. Now, however, thanks to the courageous action of 17 American former Gulf War POWs brutally tortured by Iraq, and 37 of their family members, we have a unique opportunity to establish an historic precedent that Nations which torture American POWs will be held accountable. Last year these brave Americans brought suit against Iraq in United States District Court and, following a non-appearance by Iraq, an entry of default was entered on September 25, 2002. Their case will go to the equivalent of a bench trial before a federal district judge on March 31 of this year. Under current law, these American POWs and their family members will be able to enforce any final judgment obtained against the substantial Iraqi blocked assets in the United States.

This would truly be one of the first serious efforts to add deterrence against the torture of American POWs. We believe that this is an historic opportunity that should not be lost. It is time now to establish the principle that we will not return blocked assets of a former enemy state absent full account-

ability for that state's liability in the torture of American POWs. In this case, that means that no blocked assets of Iraq should be returned to that country until provision has been made for the full payment of any court judgment.

In the event that Iraq refuses to disarm, and war and the inevitable American victory comes, some will urge you to seek legislation to return all blocked assets for the future reconstruction of Iraq, thus overturning current law permitting the POWs to enforce any judgment against the blocked Iraqi assets. We understand the importance in such circumstances of American assistance in bringing about a stable new government in Iraq rooted in the rule of law. That objective should not come, however, at the cost of failing to hold Iraq responsible for its torture of American POWs. The responsibility for torture of American POWs must be regarded by the United States, as it is set out in Article 131 of the POW Convention, as a non-absolvable responsibility of the Contracting State itself. Moreover, it would be simply unthinkable to ask the American POWs tortured by Iraq to bear the cost of the reconstruction of Iraq.

Never before has an American President had such an opportunity to strike a blow against the torture of our POWs. This is truly a unique opportunity to send a signal to all future tyrants that America values the rule of law and that we will hold nations that torture American POWs accountable.

Dick Cheney, as then-Secretary of Defense, and Mrs. Cheney, and Colin Powell, as then-Chairman of the Joint Chiefs of Staff, as well as Mrs. Powell, personally welcomed these American heroes back from their brutal captivity in Iraq. A decade later, let us embrace these brave Americans in their historic effort to say "never again" to such brutal treatment of our service personnel.

Thank you for your consideration.

Sincerely,

DISTINGUISHED AMERICANS APPENDING
THEIR NAMES TO THIS LETTER

Governor Bill Richardson
former United States Ambassador to the United Nations

Ambassador Max M. Kampelman
Chairman Emeritus of the American Academy of Diplomacy,
Georgetown University Institute for the
Study of Diplomacy & Freedom House

The Honorable Anthony Lake
former Assistant to the President for National Security Affairs

The Honorable John Lehman
member of the 9/11 Commission &
former Secretary of the Navy

Ambassador Ronald F. Lehman
former Assistant Secretary of Defense for
International Security Policy & Director of the
United States Arms Control and Disarmament Agency

Admiral Thomas H. Moorer, U.S.N. (Rel.)
former Chairman of the Joint Chiefs of Staff

Admiral Paul A. Yost, Jr. U.S.C.G. (Rel.)
Commandant of the United States Coast Guard (19864 990)

Davis R. Robinson
former Legal Adviser to the U.S. Department of State

Abraham D. Sofaer
former Legal Adviser to the U.S. Department of State

Ambassador Richard Schifter
former Assistant Secretary of State
for Human Rights and Humanitarian Affairs

Ambassador Mark Palmer
former Deputy Assistant Secretary of State
and Ambassador to Hungary

Ambassador W. Nathaniel Howell
former U.S. Ambassador to the State of Kuwait

Ambassador David C. Jordan
Professor of Government and Foreign Affairs &
former U.S. Ambassador to Peru

Vice Admiral James H. Doyle, Jr. U.S.N. (Ret.)
former Deputy Chief of Naval Operations

Major General John K. Singlaub U.S.A. (Ret.)
former Chief of Staff, U.S. Forces, Korea

Lieutenant General CJ Le Van U.S.A. (Ret.)
former J3, Operations Branch, Joint Chiefs of Staff

Rear Admiral Horace B. Robertson, Jr. U.S.N. (Ret.)
Professor (Emeritus) Duke University School of Law &
former Judge Advocate General of the Navy

Malvina Halberstam
Professor of Law & former Counselor on
International Law to the Department of State

Jerome J. Shestack
Past President of the American Bar Association

Michael P. Malloy, Ph.D.
former Special Assistant for Foreign Assets Control
United States Department of the Treasury

cc: The Honorable Dick Cheney, Vice President of the United States

The Honorable Colin Powell, Secretary of State